NOR ASLAN ABD HAMID & ORS A

v.

ABDUL JALIL ABDUL HAMID & ORS;
MUHAMMAD FAUZI SHAMSUDDIN & ORS
(INTERVENERS) B

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[CIVIL SUIT NO: R1-22-01-2004]
4 AUGUST 2006 C

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Setting aside of an ex parte order before its expiry - Whether must be done by way of inter partes hearing - An ex parte order cannot be set-aside by another ex parte order*

D

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Setting aside mandatory order - Whether party against whom order was made has right to be heard before order made - Mandatory order made against interveners who were not a party*

CIVIL PROCEDURE: *Contempt of court - Breach of court order - Service of order bad in law - Where order is vague or ambiguous in description making it impossible to be complied with - Whether alleged contemnor could be held for contempt of court order* E

CIVIL PROCEDURE: *Contempt of court - Evidence - Whether mere suspicion would suffice to initiate contempt proceedings - No credible evidence adduced to support allegation that solicitor deceived court* F

This action involved two groups of people fighting to have control of National Union of Bank Employees's ("NUBE") accounts in various financial institutions. On 22 February 2003, the court granted an order ("the 22 February Order") naming 8 persons as the authorised signatories of NUBE's bank accounts. These eight persons were subsequently allowed to intervene in this proceedings ("the intervenes"). On 26 February 2003, the interveners, armed with the 22 February Order, withdrew various sums of monies from NUBE's bank accounts. On 28 February 2003 the 1st-9th defendants' solicitors M/s Daim & Gamany filed a summons in chambers (encl. 10) to dissolve the 22 February Order. The hearing of encl. 10 proceeded on the same day in the absence of the plaintiffs and their solicitors. Azmel J allowed the 1st and 9th defendants' application to dissolve the 22 February Order and ordered that all monies removed from NUBE's accounts to be replaced immediately ("the 28 February Order"). The 28 February Order was served on M/s Kalai & Partners at 5.15pm on the same day with a G H I

A covering letter informing them that if the order was not complied with by close of business on Monday 3 March 2003, committal proceedings would be initiated. M/s Kalai & Partners in a letter dated 3 March 2003, informed M/s Daim & Gamany that none of the plaintiffs "withdrew any monies from the accounts named in the order dated 22 February 2003".

B The 1st - 9th defendants then proceeded to obtain leave to commence committal proceedings ("11 March Order") and thereafter filed encl. 24 for committal of the plaintiffs, their solicitor and the interveners on the ground that the 28 February Order was not complied with. Arising from encl. 24, the following applications were filed: (i) encl. 26 - an C application by the interveners to intervene and to set-aside the 28 February Order; (ii) encl. 30 - an application by the plaintiffs and their solicitor to set aside the order of granting leave to commence committal proceedings against them; and (iii) encl. 40 - an application by the interveners to set aside the order of granting leave to commence D committal proceedings against them.

Held (allowing the applications to set-aside the leave granted to commence committal proceedings and striking off the substantive motion for committal):

E **(1)** The 28 February Order was an irregular order and ought to be set-aside. There was an existing *ex parte* 22 February Order granted against the 1st-9th defendants. Hence, if the 22 February Order is to be set-aside before its expiry (21 days) it has to be done by an *inter partes* hearing. An *ex parte* order cannot be set-aside by another F *ex parte* order. (para 19)

(2) The 28 February Order was a mandatory order, requiring "all monies removed from NUBE's accounts to be replaced immediately". Hence, the interveners must be given the right to be heard before such mandatory order is ordered against them. In this G case the interveners were never afforded such rights. Further, the 28 February Order cannot be imposed on the interveners, as the interveners were not even a party to the proceedings when the 28 February Order was obtained by the 1st-9th defendants. (para 19)

H **(3)** The 11 March Order ought to be set-aside. The alleged act of contempt against the plaintiffs was that the plaintiffs were in breach of the 28 February Order by failing to return the monies withdrawn. But the plaintiffs had never withdrawn any money from the accounts. (paras 22 & 23)

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(4) The 28 February Order was served on the plaintiffs' solicitor. Such service is bad in law as the plaintiffs are required by O. 45 r. 7 RHC to be served personally before they could be said to have wilfully disobeyed the order. The 28 February Order was also not properly served on the interveners. The cause papers were only served on the interveners' solicitors, on 13 March 2003, well after the leave for contempt proceeding was granted. Thus, the question of the interveners breaching the 28 February Order did not arise. (paras 24 & 25)

(5) The 28 February Order was vague and ambiguous. Firstly, the 28 February Order did not direct a particular amount to be paid by a named party. Secondly, there was no specific time limit within which compliance thereto must be made and therefore such non compliance cannot be willful or in deliberate disregard of the 28 February Order. (para 26)

(6) The allegation that the plaintiff's solicitor had practiced deception was a mere allegation. It is trite law that mere suspicion would not suffice to initiate contempt proceedings. There was no credible evidence adduced to support the 1st-9th defendants' contention that the plaintiff's solicitor was deceiving the court. (paras 30 & 31)

Case(s) referred to:
Capital Insurance Bhd v. BS Sidhu [1996] 3 CLJ 477 CA ***(refd)***
Gordon v. Gordon [1946] 1 All ER 247 ***(refd)***

Legislation referred to:
Rules of High Court 1980, O. 43, O. 45 r. 7
Trade Unions Act 1959, ss. 41(2), 53

For the plaintiffs - D Kalaimany (K Siladass with him); M/s Kalai & Partners
For the 1st-9th defendants - R Sivarasa (Latheefa Koya with him); M/s Daim & Gamany
For the 1st & 7th interveners - Zainur Zakaria; M/s Zainur Zakaria & Co
For D Kalaimany - K Siladass
For the 2nd, 3rd, 4th, 5th, 6th & 8th interveners - B Thangaraj; M/s Thangaraj & Assocs

Reported by Amutha Suppayah

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JUDGMENT

Raus Sharif J:

[1] The plaintiffs are members of the National Union of Bank Employees ("NUBE"). On 19 February 2003, the plaintiffs through their B solicitors M/s Kalai & Partners, filed a writ and statement of claim against the defendants, seeking *inter alia* the followings:

(a) A declaration that the authorised signatories for all bank accounts belonging to NUBE are as follows:

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President:	Muhammad Fauzi bin Shamsuddin
Deputy President:	A. Prathiba Raj
3 Vice Presidents:	Azhar bin Mohd Yusof Abdul Malek bin Daud S. Kandaiyah
Hon. General Secretary:	Mohd Noor bin Basir
Assistant Hon. General Secretary:	Jamal Ud-Deen Nasir Khan
Hon. Treasurer:	Toh Seng Hock

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(b) An injunction under s. 53 Trade Unions Act 1959 ("TUA") restraining the 1st-9th defendants, its employees, or its agents in whatsoever manner operating the funds in NUBE's accounts in:

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1)	Bumiputra-Commerce Bank Berhad	1408-1198229-059/ 1408-0050114-007
2)	HSBC Bank (M) Berhad	301-216610-001
3)	Standard Chartered Bank Malaysia Berhad	836-107543433
4)	AmBank Berhad	0012021001696

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(c) An injunction restraining the 10th defendant, its employees or its agents from allowing in whatsoever manner the 1st-9th defendants or its employees or its agents from operating in whatsoever manner NUBE's funds and accounts generally and specifically funds in NUBE's Account No. 0012021001696 with AmBank Berhad;

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(d) An injunction restraining the 11th defendant from sending the NUBE members subscriptions to NUBE Head Office at No. 61, Jalan Ampang, 50780 Kuala Lumpur and a direction that the 11th defendant to post the NUBE members subscription to Lot 2.33 and 2.37, Tingkat 2, Kompleks Wilayah, Jalan Dang Wangi, 50100 Kuala Lumpur;

(e) An order under O. 43 Rules of High Court 1980 ("RHC") ordering for an account to be taken between NUBE and 1st-9th defendants to ensure that all monies withdrawn by the 1st-9th defendants from the NUBE's accounts as "unauthorized" or "unlawful expenditure of funds" between 1 June 2002 till final decision of this case as per prayer (a) is made and the amount monies certified by this court as withdrawn by the 1st-9th defendants from NUBE's accounts are to be paid to NUBE by the 1st-9th defendants immediately;

(f) Damages; and

(g) Interests and costs.

[2] Simultaneously, on the same date, ie, 19 February 2003, the plaintiffs also filed an *ex parte* summons in chambers (encl. 4) for an interim injunction of the injunctive prayers sought for in the statement of claim. The plaintiffs in their affidavit in support of encl. 4 asserted in essence that the 1st-9th defendants were illegitimate officers of NUBE and they were operating NUBE's accounts without authority.

[3] On 22 February 2003, Azmel J (as he then was) granted an order in terms of encl. 4 ("22 February Order") and in the said order named the following eight persons as the authorised signatories of NUBE's bank accounts:

(i) Mohd Fauzi bin Shamsuddin;

(ii) Prathiba Raj a/l V K Arunasalam;

(iii) Mohd Azhar bin Yusof;

(iv) Abdul Malek bin Daud;

(v) Kandaiyah a/l S Suppiah;

(vi) Mohammad Noor bin Basir;

(vii) Jamal Ud-Deen Nasir Khan;

(viii) Toh Seng Hock,

(These 8 persons were subsequently allowed to intervene in this proceedings ("the interveners"))

[4] On Wednesday, 26 February 2003, the interveners, armed with the 22 February Order, withdrew a total of RM614,092.70 from Bumiputra-Commerce Bank (RM34,090.55 from the General Fund Account and RM300,002.15 from the Benevolent Fund Account). On the next day, Thursday 27 February 2003, the interveners, using the same 22 February Order, withdrew RM652,060.60 in cash from AmBank.

[5] Meanwhile, on the same day ie, Thursday 27 February 2003, sometime in the afternoon, the 1st-9th defendants' solicitors, M/s Daim & Gamany, appeared before James Foong J (a case management judge of the Civil Division at the material time) to make an oral application to dissolve the 22 February Order. James Foong J rightly directed a written application by summons to be filed.

[6] The 1st-9th defendants, on Friday 28 February 2003 filed a summons in chambers (encl. 10) to dissolve the 22 February Order with an affidavit in support in encl. 9. They served the papers on M/s Kalai & Partners on the same day at about 9 am. However, Mr. D. Kalaimany of M/s Kalai & Partners informed M/s Daim & Gamany that the plaintiffs needed time to reply to the affidavit and he could not attend the hearing because of his prior engagement.

[7] The hearing of encl. 10 proceeded on the same day, ie, Friday 28 February 2003 between 11.30am to 12.15pm before Azmel J. The plaintiffs and their solicitors were absent. Azmel J allowed the 1st and 9th defendants' application to dissolve the 22 February Order and ordered that all monies removed from NUBE's accounts to be replaced immediately (28 February Order).

[8] The 28 February Order was served on M/s Kalai & Partners at 5.15 pm on the same day with a covering letter informing them that if the order was not complied with by close of business on Monday 3 March 2003, committal proceedings would be initiated.

[9] M/s Kalai & Partners in a letter dated 3 March 2003, informed M/s Daim & Gamany that none of the plaintiffs "withdrew any monies from the accounts named in the order dated 22 February 2003" and requested that the plaintiffs be given time till 7 March 2003 to respond to 28 February Order. M/s Kalai & Partners in the same letter also informed M/s Daim & Gamany that they have no instructions to act for the interveners.

[10] On 5 March 2003, the 1st-9th defendants filed committal proceedings (encl. 17) against the plaintiffs, the interveners and Mr. D. Kalaimany, the solicitor acting for the plaintiffs, on the ground that the 28 February Order had not been complied with. Leave to commence committal proceedings was granted on 11 March 2003 ("11 March Order").

[11] On 12 March 2003, the 1st-9th defendants filed encl. 24 for committal of the plaintiffs, the interveners and Mr. D. Kalaimany. Arising from encl. 24 a number of applications were filed therein. The contentious applications were:

(i) Enclosure 26 – An application by the interveners *inter alia* to intervene and to set-aside the 28 February Order;

(ii) Enclosure 30 – An application by the plaintiffs and Mr. D. Kalaimany to set aside the order of granting leave to commence committal proceedings against them.

(iii) Enclosure 40 – An application by the interveners to set aside the order of granting leave to commence committal proceedings against them.

[12] Before going into the merit of the above applications, it is necessary to lay down the background facts of the disputes between the parties. This suit is one of the many suits filed, arising from leadership disputes in NUBE. While this suit was filed by the plaintiffs, the conflict in NUBE was primarily between the 1st-9th defendants and the interveners.

[13] The problem in NUBE started when both groups submitted separate Forms L pursuant to s. 41(2) of TUA to the Director General of Trade Union ("DGTU") each claiming to be the lawful office bearers of NUBE. The DGTU in a letter dated 29 May 2002, rejected Forms L submitted by the 1st-9th defendants, but accepted Forms L submitted by the interveners. The letter effectively declared the interveners as the rightful office bearers of NUBE.

[14] The decision of the DGTU in rejecting Forms L, submitted by the 1st-9th defendants and in accepting Forms L, submitted by the interveners, was seriously contested by the 1st-9th defendants. On 5 June 2002, the 1st-9th defendants filed a judicial review application to quash the decision of DGTU *vide* R1-25-69-2002.

[15] While the judicial review application was pending, both groups were representing themselves as the lawful office bearers of NUBE. The 1st-9th defendants operated their activities at the NUBE Head Office at 61, Jalan Ampang, Kuala Lumpur. The

A interveners had registered their operational address at Lot 2.33 & 2.37, 2nd Floor, Kompleks Wilayah, Jalan Dang Wangi, 50100 Kuala Lumpur.

[16] Hence, we have these two groups at the material time competing against each other to be recognised as the lawful office bearers of B NUBE as well as fighting to have control of NUBE's accounts in the various financial institutions.

[17] The speed and manner taken by the parties in obtaining the court's orders, is a reflection of the intense rivalry between the two C groups. The 22 February Order was obtained by the plaintiffs. But it was the interveners, who were not a party to the proceedings, who acted on the 22 February Order. They withdrew the monies from the NUBE's account and placed the monies under their control. The 1st-9th defendants responded quickly by running to the court on D 27 November 2002, to have the 22 February Order dissolved.

[18] With the above background in mind, I will now first deal with encl. 26. As stated earlier encl. 26 is the applications by the interveners to set-aside the 28 February Order which set-aside the 22 February Order obtained by the plaintiffs. The 28 February Order ordered that E all monies removed from NUBE's accounts were to be replaced forthwith.

[19] It is my judgment that the 28 February Order is an irregular order and ought to be set-aside. My reasons are:

F (i) there was an existing *ex parte* 22 February Order granted against the 1st-9th defendants. Hence, if the 22 February Order is to be set-aside before its expiry (21 days) it has to be done by an *inter partes* hearing. The interveners should be given the right to defend themselves to the serious allegations made by the 1st-9th defendants G while obtaining the 28 February Order. To me, the 1st-9th defendants should not have applied to set-aside the 22 February Order by an *ex parte* order. This is because an *ex parte* order cannot be set-aside by another *ex parte* order.

H (ii) The 28 February Order was a mandatory order, requiring "all monies removed from NUBE's accounts to be replaced immediately". Hence, the interveners must be given the right to be heard before such mandatory order is ordered against them. In this case the interveners were never afforded such rights.

I (iii) The 28 February Order cannot be imposed on the interveners, as the interveners were not even a party to the proceedings when the 28 February Order was obtained by the 1st-9th defendants.

[20] For the above reasons, the 28 February Order against the interveners is hereby set-aside.

[21] The next contentious applications are encl. 30 and encl. 40. Enclosure 30 is the application by the plaintiffs and Mr. D. Kalaimany to set-aside the 11 March Order ie, the granting of leave to commence committal proceeding against the plaintiffs and Mr. D. Kalaimany. Enclosure 40 is a similar application by the interveners.

[22] I am of the view that the 11 March Order ought to be set-aside and my reasons are as follows:

Against The Plaintiffs

[23] The alleged act of contempt against the plaintiffs is that the plaintiffs were in breach of the 28 February Order by failing to return the monies withdrawn. But the plaintiffs had never operated the NUBE's accounts or withdraw any money from the accounts. Hence, the allegations by the 1st-9th defendants in encl. 16 that the plaintiffs operated the accounts, misused the funds, transferred large amount of money into their personal accounts is a clear misrepresentation of facts by the 1st-9th defendants.

[24] It is not in dispute in this case that the 28 February Order was not served personally on the plaintiffs. The 28 February Order was served on the plaintiffs' solicitor. To me such service is bad in law as the plaintiffs are required by O. 45 r. 7 RHC to be served personally before they could be said to have willfully disobeyed the order (See *Capital Insurance Bhd. v. BS Sidhu* [1996] 3 CLJ 477 CA and *Gordon v. Gordon* [1946] 1 All ER 247.

[25] Furthermore when the 28 February Order was served on the plaintiffs' solicitors, the plaintiffs' solicitor did inform M/s Daim & Gamany that none of the plaintiffs "withdrew any monies from the accounts named in the order dated 22 February 2003," and requested that the plaintiffs be given time till 7 March to respond to the 28 February Order. The request was ignored as the 1st-9th defendants, on 5 March chose to file the committal proceedings, not only against the plaintiffs, but also their solicitor, Mr. D. Kalaimany as well as the interveners.

Against The Interveners

[26] The alleged acts of contempt against the interveners are:

(a) Breach of the 28 February Order by failing to the return the monies withdrawn.

(b) Collusion with Mr. D. Kalaimany to deceive the court.

A However, the 28 February Order was also not properly served on the interveners. On the facts of this case, the 28 February Order was served on M/s Kalai & Partners at 5.15pm on Friday 28 February 2003. But as indicated by M/s Kalai & Partners in his letter to M/s Daim & Gamany that they were not acting for the interveners. Hence, B the interveners were not served with the 28 February Order. In fact the cause papers were only served on M/s Thangaraj, the interveners' solicitors, on 13 March 2003. It was well after the leave application for contempt proceeding was granted. Thus, the question of the interveners breaching the 28 February Order, does not arise.

C **[26]** I am also of the view that the 28 February Order is vague and ambiguous. Firstly, the 28 February Order does not direct a particular amount to be paid by a named party. Secondly, there was no specific time limit within which compliance thereto must be made and therefore such non compliance cannot be willful or in deliberate disregard of the D 28 February Order.

[27] The speed of the contempt proceedings initiated by the 1st-9th defendants is a reflection of a *mala fide* intention on the part of the 1st-9th defendants. To me, it is impossible for the interveners to comply with the 28 February Order, in a such a short notice, especially so E when the interveners were not a party to the proceedings when the 28 February Order was obtained by the 1st-9th defendants.

[28] It is also my finding that there is no clear evidence before the court that the interveners were in collusion with Mr. D. Kalaimany or F the plaintiffs to deceive the court. There cannot be any collusion, as the interveners were not a party to the proceedings of the main suit. The interveners were not responsible to the affidavits filed in the main suit as Mr. D. Kalaimany was representing the plaintiffs and not the interveners.

G **Against Mr D Kalaimany**

[29] Mr. D. Kalaimany was charged for being in collusion with the interveners and practiced deception when he acted for the plaintiffs in obtaining the 22 February Order. However, in the statement in encl. 16, H there was no particulars of deception and collusion was given. In this case Mr. D. Kalaimany was not a party to the action. He was acting for the plaintiffs. He acted as an advocate and solicitor to obtain the 22 February Order. The plaintiffs after obtaining the 22 February Order did not withdraw or deal with NUBE monies with the financial institutions. I Thus, it is too harsh a condition to impose on Mr. D. Kalaimany and seek compliance of the 28 February Order. The money was withdrawn

by the interveners, but Mr. D. Kalaimany was not representing the interveners. He cannot be made accountable or responsible for the acts of the interveners in withdrawing the NUBE's monies.

[30] On the facts of this case the allegation that Mr. D. Kalaimany had practiced deception is a mere allegation. It is trite law that mere suspicion would not suffice to initiate contempt proceedings. In fact Mr. D. Kalaimany had explained in his affidavit (encl. 34) on the allegation that "he did not disclose the pending court proceedings of which he has knowledge". According to him, he has no knowledge of the named proceedings and the one he was involved has no relevance to the present case. With regard to the non service of the 22 February Order to M/s Daim & Gamany, he pointed out that fact that the firm was not on record as on 25 February 2003. M/s Daim & Gamany effectively came on record on 26 February 2003.

[31] In short, there is no credible evidence being adduced to support the 1st-9th defendants' contention that Mr. D. Kalaimany was in fact deceiving the court.

[32] In light of the above, I am of the view that the plaintiffs', Mr. D. Kalaimany's and the interveners' applications to set-aside the leave granted to the 1st-9th defendants to commence committal proceedings against them ought to be allowed, and for the same reasons, the 1st-9th defendants' substantive motion for committal in encl. 24 be struck off.

[33] With regard to costs, I am making an order that each party to bear their own costs. On the facts of this case, I cannot for certain say that the plaintiffs, Mr. D. Kalaimany and more particularly the interveners are blameless in this unpleasant episode. Eventhough they succeeded in their applications they are not entitled to costs.